In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 810

FRANCIS A. SIMPSON, JR., JAMES T. SKEENS, JOHN C. RENNER, AND FEDORA A. FLANAGAN, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The court of appeals issued no opinion.

JURISDICTION

The judgment of the court of appeals was entered on September 21, 1965 (R. 51; Pet. App. 3a–4a), and a petition for rehearing *en banc* was denied on November 9, 1965 (R. 52–61). The petition for a writ of certiorari was filed on December 9, 1965. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

798-729—66

QUESTIONS PRESENTED

1. Whether, in a prosecution for illegal possession of numbers slips, there was probable cause for the issuance of arrest and search warrants.

2. Whether it was proper to permit government counsel to answer the comments of petitioner's counsel, in his closing argument, on the government's failure to produce witnesses whose names and telephone numbers appeared on a list seized in execution of a search warrant.

STATEMENT

Petitioners were charged in the United States District Court for the District of Columbia with gambling offenses, in violation of 18 U.S.C. 1952 and 22 D.C. Code 1501, 1502, 1505, and conspiracy (R. 12). They were found guilty by the jury only on Count 4 (possession of numbers slips in violation of 22 D.C. Code 1502) (R. 48–49); a mistrial was declared on the remaining counts after the jury announced that it was hopelessly deadlocked (R. 47). Petitioners Simpson, Skeens and Renner were sentenced to imprisonment for one year, and petitioner Flanagan was placed on probation for two years (R. 18–19). On appeal, the convictions were affirmed (R. 19–20, 51; Pet. App. 3a–4a).

1. On October 12, 1962, ten F.B.I. agents signed an affidavit in support of an arrest warrant for petitioners Simpson, Skeens, and Flanagan and a search warrant for premises located at 1452 Ogden Street, N.W., Washington, D.C. (R. 3–11). The affidavit stated that information had been received from

sources proved to be reliable on numerous past occasions that Simpson was conducting a numbers and gambling operation at this address (R. 3). In support, the affidavit stated that confidential informants had furnished information that Simpson and his associates frequently moved to avoid detection, that they had been known to operate at 6214 Third Street, N.W., and that Skeens and Flanagan had been employed with Simpson in his numbers operations at one or both of the two addresses (R. 3). The affidavit recited various occasions between August 6, 1962, and October 11, 1962, when agents had seen Skeens and Renner driving their automobiles in Maryland; Simpson driving his automobile from Virginia to Washington, D.C.; Simpson, Skeens and Renner near the premises at 6214 Third Street, N.W.; Simpson, Renner and Skeens having lunch at a Georgia Avenue Hot Shoppe; and Simpson, Skeens, Renner and Flanagan entering and leaving the premises at 1452 Ogden Street, N.W. (R. 3-9). The affidavit further stated that it was known that Simpson had been arrested for lottery and horse bets by the Arlington, Virginia, police in 1955; that Skeens had been arrested in an investigation of possession of gambling equipment in 1957; that Skeens had been convicted in 1949 of assault with a deadly weapon arising out of a dispute over the collection of a gambling debt; that Fedora Flanagan had been arrested on January 21, 1961, by Arlington, Virginia, police for violation of the lottery laws; that Renner had been arrested on May 30, 1962, for tampering with a slot machine; and that one Sikes advised that

on June 15, 1962, in Washington, D.C., he had been beaten up by Skeens, Renner, and others for what Skeens considered "welching" on a baseball bet (R. 9–10).

The arrest and search warrants were issued on October 12, 1962, and executed on October 15 at 6:15 p.m. (R. 1–2). A pre-trial motion to suppress the evidence seized was denied (R. 13). The numbers slips and various gambling paraphernalia seized in the raid were admitted in evidence at the trial over petitioners' objections.

2. One of the items taken in execution of the search warrant was Gov. Exhibit No. 20–C, which contained a list of names and telephone numbers found in the bottom of a shoe box (R. 50). In referring to this exhibit in closing argument, petitioners' counsel, after reading some names and telephone numbers, stated (R. 31):

> Well, you have, I would estimate, probably twenty-five to thirty names on that card and you know as well as I, the FBI, I am sure, has talked to everybody named or everyone listed on that card and if they could establish that any of these names were used as gamblers or had bet with these people, this courtroom wouldn't be big enough, we'd have to open all the doors to let a third of them in at one time.
>
> Here you have all these names, every one of them, and their telephone numbers listed, and an amateur sleuth such as you and I could run that down, and they don't have any of these people here at all.

In reply, government counsel, after pointing out that petitioners' counsel had omitted to read the code

ARGUMENT

1. There was ample evidence of probable cause before the commissioner to justify the issuance of search and arrest warrants. See *United States* v. *Ventresca,* 380 U.S. 103; *Rugendorf* v. *United States,* 376 U.S. 528; *Jones* v. *United States,* 362 U.S. 257. The affidavit recited information given to affiants by informants who had proved reliable on numerous past occasions and set forth in detail the agents' observations confirming the reliability of the information. As the affidavit showed, the agents had observed Simpson and Skeens on several occasions at the first address given by the informants, and more than a month later had seen all three at the second address on nine consecutive weekdays. This tended to verify the informants' information. Additional verification lay in the time of day petitioners entered and left their headquarters on these weekdays—between 11:00 a.m. and noon, and after 6:00 p.m. (R. 6–9). These would be the expected working hours of a numbers operation based on pari-mutuel totals at a race track. And the police records showing petitioners' history of involvement in illegal gambling activities were relevant, albeit not alone sufficient, on the issue of probable cause. *Brinegar* v. *United States,* 338 U.S. 160, 172–174.

2. In closing argument, petitioners' counsel stated that he and the jury knew that the F.B.I. had spoken to the 25 to 30 persons listed on Gov. Ex. 20–C and would have brought them in as witnesses if the government had been able to establish that any of them had placed bets with petitioners (R. 31). In this

context, the court properly permitted government counsel to suggest in reply that if called as witnesses these persons might have refused to testify on Fifth Amendment grounds. For government counsel may, in closing argument, make responses to defense arguments which might be inappropriate if defense counsel had not first raised the subject. *Lawn* v. *United States,* 355 U.S. 339, 359–360, n. 15; *United States* v. *Socony-Vacuum Oil Co.,* 310 U.S. 150, 241, 242; *Homan* v. *United States,* 279 F. 2d 767, 775–776 (C.A. 8), certiorari denied, 364 U.S. 866; *Gridley* v. *United States,* 44 F. 2d 716, 739 (C.A. 6), certiorari denied, 283 U.S. 827.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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